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IN THE

Supreme Court of the United States

October Term, 1955

No. 246

CAPITAL TRANSIT COMPANY, INC., *Petitioner,*

v.

NETTIE E. FOSTER, CLURE EDDIE FOSTER, GENEVA CURRY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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July 19, 1955.

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To The Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Capital Transit Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above captioned case on May 26, 1955.

OPINIONS BELOW

The District Court wrote no opinion. Its memorandum and order overruling the motions for judgment n.o.v. and for a new trial (R. 12-13) are not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 88-90) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1955 (R. 91). A petition for rehearing in banc was filed June 8, 1955 (R. 92-100), and was denied per curiam June 16, 1955 (R. 101). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a motion for a new trial under Federal Rules of Civil Procedure 50 (b) and 59 does not require the trial court to exercise his discretion to determine whether the verdict is contrary to *the weight of the evidence.*

2. Whether the evidence supporting the verdict in this case was not so insubstantial, unreliable and unbelievable that judgment n.o.v. should have been granted to petitioner.

HOW QUESTIONS WERE RAISED

A motion for a directed verdict was made and overruled at the close of all the evidence (R. 78, 79). Motions for judgment n.o.v. and, in the alternative, for a new trial were made and overruled following the verdicts and judgments (R. 11, 12-13). The first question here raised, relating to the standard to be used in

ruling on a motion for a new trial, was specifically raised and argued in petitioner's brief in the Court of Appeals, a copy of which is here included as an appendix to this petition (Appellant's Brief in Court of Appeals, App. 9a-12a). The same question was urged in the petition for rehearing in banc, which is also attached (Petition for Rehearing en Banc and Modification of Judgment, R. 98-100). The second question here raised, relating to the insubstantiality of the evidence, was likewise specifically raised and argued in the Court of Appeals on the original appeal (Appellant's Brief in the Court of Appeals, App. 6a-9a) and in the petition for rehearing (Petition for Rehearing en Banc and Modification of Judgment, R. 93-98).

FEDERAL RULES INVOLVED

The pertinent part of Federal Rule of Civil Procedure 50 (b) is as follows:

"Rule 50. Motion for a Directed Verdict

"(a) . . . .

"(b) Reservation of Decision on Motion . . . . Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been di-

rected. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

The pertinent part of Federal Rule of Civil Procedure 59 is as follows:

"Rule 59. New Trials; Amendment of Judgments

"(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

"(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

"(c) Time for Serving Affidavits . . . .

"(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

"(e) Motion to Alter or Amend a Judgment . . . ."

STATEMENT

This suit was brought by respondents against petitioner as the result of injuries incurred when a car operated by respondent Nettie Foster ran into the rear of one of petitioner's buses which had stopped to pick up a passenger.

On Sunday night, January 21, 1951, six members of the Foster family left Greensboro, North Caroline, where they had spent the weekend, and drove back to Washington, D. C. The trip took some six hours, the family leaving Greensboro after dark on Sunday night and reaching Washington about five o'clock Monday morning (R. 26-27). Respondent Clure Foster Sr. was driven directly to his place of work in Washington and turned the driving over to his wife, respondent Nettie Foster (R. 27). In the back seat at the time were Nettie Foster's grandmother-respondent Geneva Curry) and two of the Fosters' children (Jerome Foster and Clure Foster Jr.) (R. 17). At about 6:30 a.m., as Nettie Foster was driving toward their home in another part of the city, the car ran into the rear of petitioner's standing bus (R. 17-18, 28, 44-45, 63, 72-73). The weather was good and there was no traffic in the vicinity (R. 17, 18, 62).

Respondent sued petitioner in the United States District Court for the District of Columbia (Bastian, J.), alleging negligence in the operation of the bus. Nettie Foster and Geneva Curry sued for damages as a result of injuries they received in the accident; Clure Foster Sr. sued for loss of his wife's consortium (R. 2-5).

There were two versions of the accident at the trial. One was given by the only disinterested witness, a Mr. Bishop, and by the busdriver. The other was given by Nettie Foster.

Mr. Bishop, an elderly colored man, was waiting for the bus at a bus stop, and he testified that when it came to a stop beside him, he was opposite its rear door. He walked to the front of the bus and began to get on. He had stepped into the bus and was about to give his transfer to the driver when the Foster car crashed into the right rear of the bus. Mr. Bishop was unequivocal in his testimony that the bus was at a full stop before the collision a sufficiently long time for him to walk from the rear door of the bus to its front (R. 62, 63, 65, 67).

This testimony was corroborated in all respects by the busdriver, who said that when he saw Mr. Bishop, the bus was going about 15 or 20 miles an hour. He pulled over to the curb and stopped some 15 or 20 feet beyond where Mr. Bishop stood. It took Mr. Bishop some three to five seconds to walk to the front of the bus, and he was entering the door when the Foster car rammed the rear of the bus. There were no other passengers in the bus at the time (R. 72-76).

The two police officers who investigated the accident—one called as a witness for respondents and the other called as a witness for petitioner—both testified that they talked to Nettie Foster either at the scene of the accident or at the hospital and that she did not "remember anything about the accident" (R. 50, 51, 68). They both testified that Nettie Foster told them she was "following behind the bus", that she was driving about 25 miles per hour, and that she was unable to recall what happened (R. 50, 51, 68). She made no claim that the bus overtook her and cut in front of her (R. 50-51, 69).

The officers also testified that when they arrived on the scene, the right front end of the bus was close to

the curb, the right rear end was about four feet from the curb, and the front of the car had struck the right rear end of the bus (R. 46-47, 70-71).

The second version of the accident at the trial was given solely by Nettie Foster, who now changed the story she had given the police officers on the day of the accident some 45 months before. She now claimed that the bus, going about 30 or 35 miles per hour, swerved in front of her and stopped so suddenly that she could not avoid running into it (R. 16-22, 26-28). She had stated in a deposition in August, 1952, that her lights were not on, or only her dim road lights were on, at the time of the accident; at the trial in 1954, she testified that her full lights had been on (R. 18, 28-30). Her story at the trial was completely uncorroborated, none of the other occupants of the car claiming to know any of the facts relative to the bus prior to impact (R. 32-35, 36-38).

At the close of the evidence (except for the introduction of an interrogatory relating to schedule) the following colloquy took place (R. 78):

> "The Court: Have you any prayers?
>
> "Mr. Roberson (Counsel for petitioner): I have a prayer for a directed verdict.
>
> "The Court: I'm afraid I will have to overrule you.
>
> "Mr. Roberson: I think Your Honor ought to hear me.
>
> "The Court: It will have to be good. *I think the evidence certainly preponderates, in my opinion, in your favor.* Let's go ahead and listen to what you have to say." (Emphasis added)

After further argument and after the introduction of the interrogatory, petitioner again moved for a directed verdict, and the court overruled the motion (R. 79). The jury returned verdicts against petitioner totalling $39,000 (R. 8-10.) Petitioner then made two motions: (1) a motion for judgment n.o.v. on the ground that there was *"no substantial evidence"* to support the verdicts, and (2) in the alternative, a motion to set aside the verdicts and grant a new trial on the ground that the verdicts were "against the weight of the evidence" (R. 11).

The trial judge, however, overruled both motions in the following language, which constitutes the court's memorandum in its entirety (R. 12-13):

> "The Court is of the opinion that there is *substantial evidence* to support the verdict of the jury. Accordingly, the motions for judgment n.o.v. *and for a new trial* are overruled." (Emphasis added)

Petitioner appealed to the Court of Appeals on the ground, *inter alia,* that the trial court had applied the incorrect standard in overruling the motion for a new trial and, therefore, had, in effect, not passed upon the motion at all (Appellant's Brief in the Court of Appeals, App. 9a-12a). The Court of Appeals (Edgerton, Bazelon and Washington, JJ.) affirmed the judgments, finding what it thought was sufficient evidence *to take the case to the jury.* Its discussion of petitioner's point relative to the motion for a new trial consisted of the following sentence (R. 90):

> "In connection with appellant's other contentions, we find no error affecting substantial rights."

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia Circuit erred:

1. In holding, by affirming the judgments, that the standard for passing on a motion for a new trial is whether there is "substantial evidence" to support the verdict.

2. In failing to hold that in passing on a motion for a new trial the trial judge must determine whether the verdict is against the weight of the evidence.

3. In holding that there was substantial evidence to support the verdicts.

4. In affirming the judgments.

REASONS FOR GRANTING THE WRIT

1. The practice in this case of using the "substantial evidence" test to rule upon a motion for a new trial under Federal Rules of Civil Procedure 50 (b) and 59 is directly in conflict with the practice prescribed by this Court and followed in other circuits

The trial court in this case denied both the motion for judgment n.o.v. and the motion for a new trial on the single ground that "there is substantial evidence to support the verdict of the jury" (R. 12). But whether there is substantial evidence to support the verdict is the test only of whether judgement n.o.v. is justified; it is immaterial in a determination of whether a new trial is required.

The District Court's disposition of these motions, as if they both presented the same issue for determination, was directly contrary to this Court's ruling in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940). That case involved a construction of Federal Rule of Civil Procedure 50(b). The District Court had

granted judgment n.o.v. but had failed to rule on a motion for a new trial. The Court of Appeals held the judgment n.o.v. in error but entered judgment on the verdict instead of remanding the case to the District Court for a ruling on the motion for a new trial. Apparently there the Court of Appeals was of the opinion, as were the two lower courts in this case, that the two motions presented in substance the same question for decision and that a ruling on one in effect determined the other. But this Court reversed and said:

> "... The motion for a new trial assigned grounds not appropriate to be considered in connection with the motion for judgment. It put forward claims that *the verdict was against the weight of the evidence* and was excessive; that the court erred in rulings on evidence and in refusing requested instructions. An affirmative finding with respect to any of these claims *would have required a new trial whereas none of them could be considered in connection with the motion for judgment.*
>
> "....
>
> "Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that *the verdict is against the weight of the evidence,* that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.
>
> "....

> "If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon he should also rule on the motion for a new trial, indicating the grounds of his decision . . . ." (311 U.S., 249, 251, 253. Emphasis added)

If the only question on each motion was whether there was substantial evidence to support the verdict, it would have been superfluous to remand for a ruling on the second motion when the Court of Appeals had already held the District Court in error on the first motion. The Court of Appeals for the Eighth Circuit in the *Montgomery Ward* case, in fact, had specifically held that the case must be decided by the jury "if there is *substantial evidence* in support of the issues tendered by the plaintiff" and that "There was *substantial evidence* to warrant the jury" in finding negligence (108 F. 2d 848, 852. Emphasis added). This Court accepted this ruling but nevertheless ordered a remand to the District Court for a ruling on the motion for a new trial, which, as the Court said, raised different issues, such as whether "the verdict is against the weight of the evidence . . . ." (311 U.S., 249, 251).

This Court was not requiring an empty gesture. The two grounds for the two motions are entirely different.[1] In determining whether there is substantial evidence to take the case to the jury or to support the verdict, the trial judge looks primarily to the weight and

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[1] "A motion for judgment, under Rule 50 (b), in accordance with movant's motion for directed verdict, is, of course, to be tested by the same standards as the motion for directed verdict and, therefore, like the latter motion is distinguishable from a motion for a new trial on the ground that the verdict is against the weight of the evidence." 5 Moore's Federal Practice (2d ed), § 50.03, p. 2320. See also § 50.12, p. 2339.

character of the plaintiff's or winning party's evidence. Thus, assuming for purposes of argument in this case that Nettie Foster's testimony, taken in isolation and ignoring the testimony of the police officer introduced by her and the other evidence in the case, was in some wise creditable, the trial court might have felt that the case should go to the jury and that after the verdicts, judgment should not be entered for petitioner. But in determining whether the verdict is against the weight of the evidence—the test on motions for a new trial—the trial judge must weigh *all* the evidence in the case. This is not to say that he puts himself in the place of the jury, or replaces the verdict with his own view of the better result. But he must exercise his discretion and review the whole record to determine whether the verdict is against the weight of the evidence. Thus, in this case, regardless of how substantial Nettie Foster's testimony appeared when standing alone, it clearly evaporated in the face of the diametrically-opposed version of the accident given by the only disinterested witness, the testimony of other witnesses and her own prior contradictory statements.

The District Court's confusion between these two motions and the determinative effect this confusion had on the outcome of this case are dramatically demonstrated by the court's own statement to counsel for petitioner, shortly before the case went to the jury, that "the evidence certainly preponderates, in my opinion, in your favor" (R. 78). This was precisely the type of decision which was subsequently called for by the motion for a new trial but which was never made. The court apparently felt that since there was "substantial evidence" to support the verdict, he was compelled to deny a new trial as well as judgment n.o.v. He never used his discretion, as required by this

Court, to determine where the weight of the evidence lay, though his statement to counsel makes it clear how he would have decided that issue if he had used the correct standard.

A case remarkably similar to this one in its pertinent facts in conflict with it in result is *Magee* v. *General Motors Corp.*, 213 F. 2d 899 (3d Cir. 1954). In that case the trial judge stated after the verdict was rendered that "It is my opinion that that (verdict) is clearly against the weight of the evidence in this case". However, the judge died before he could pass on motions for judgment n.o.v. and for a new trial. A new judge denied these motions, stating:

> "It is my judgment that as a matter of law, under all the evidence, a basis exists for which the law affords relief to the plaintiff." (117 F. Supp. 101, 103.)

The Court of Appeals reversed—not because it disagreed with this finding but because the trial court used the judgment n.o.v. standard in passing on the motion for a new trial. The Court said:

> "The motion for a new trial was based, inter alia, upon the ground that the verdict was *contrary to the weight of the credible evidence.* The district judge in his opinion disposing of the motion did not discuss the weight of the evidence, however. He denied the motion for a new trial upon the ground that he was not free to reweigh the evidence or set aside the verdict because the jury might have drawn different inferences or conclusions or the court might have thought another result more reasonable, but must take the view of the evidence most favorable to the plaintiff. *While this was the proper standard to apply to the disposition of the motion for judgment notwithstanding the verdict, its application to the new trial motion amounted to an abdication of the*

judge's functions with respect to that motion. The case must, therefore, go back to the district court for reconsideration of the motion for a new trial in the light of the court's view of the weight of the evidence and all other relevant factors. Among these would obviously be the views of the trial judge expressed at the time the verdict was rendered. See Civil Procedure Rule 63, 28 U.S.C.A." (213 F. 2d, 900. Emphasis added)[2]

As in this case, the trial judge in the *Magee* case *said* he was passing on both motions. But by using the same standard for both motions, he in effect failed to exercise his discretion and pass upon one of them. Yet the Court of Appeals for the District of Columbia Circuit affirmed the judgment in this case with a one-sentence reference to the same question of law.

Federal Rule of Civil Procedure 59 (a) (1) provides that a new trial may be granted in a jury case "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . ."[3] That the weight of the entire evidence and not the substantiality of the evidence on one side had theretofore been the test for granting a new trial is shown by a brief review of a few of the relevant cases in the Court of Appeals for the Fourth Circuit. The rule was there stated as early as 1932 in *Garrison* v. *United States,* 62 F. 2d 41, 42:

"There seems to be some confusion on the part of counsel as to the difference between the duty

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[2] Motion denied on remand, 124 F. Supp. 606, aff'd 220 F. 2d 270.

[3] For a history of the power of a court to grant a new trial, see King, *The Power to Grant New Trials,* 1 Okla. L. Rev. 252 (1948).

to direct a verdict and the duty to grant a new trial after verdict; and the contention is frequently made that the judge should direct a verdict whenever the evidence is such that he would be justified in setting the verdict aside. The distinction, however, is clear. Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence *or may think that the weight of the evidence is on the other side;* for, under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. He may, however, *set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence,* or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice. See Felton v. Spiro (C.C.A. 6th) 78 F. 576. Verdict can be directed only where there is *no substantial evidence* to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is. Gunning v. Cooley, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720. Verdict may be set aside and new trial granted, when the verdict is *contrary to the clear weight of the evidence,* or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice. For a learned and exhaustive discussion of this subject, see the opinion of Judge Lurton in Mt. Adams & E. P. Inclined Ry. Co. v. Lowery (C.C.A. 6th) 74 F. 463." (Emphasis added)[4]

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[4] Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy cited this case with apparent approval in their dissent in *Galloway v. United States,* 319 U.S. 372, 411 (1943). The majority dealt with another question.

This language was subsequently quoted with approval by the Fourth Circuit Court of Appeals in the following cases, among others:

Aetna Casualty & Surety Co. v. *Yeatts,* 122 F. 2d 350, 354 (1941), where the court also said:

" . . . On such a motion (to set aside the verdict and grant a new trial) it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict *is against the clear weight of the evidence,* or is based upon evidence which is false, or will result in a miscarriage of justice, *even though there may be substantial evidence which would prevent the direction of a verdict.*" (122 F. 2d, 352. Emphasis added)

Hawkins v. *Sims,* 137 F. 2d 66, 67 (1943), where the court added:

" . . . Such motion (for judgment n.o.v.) is to be distinguished from a motion to set aside a verdict and grant a new trial, which is addressed to the discretion of the trial judge and should be granted, *even though there be substantial evidence supporting the verdict,* if in his opinion the ends of justice so require." (137 F. 2d, 67. Emphasis added)

Snead v. *New York Central R. Co.,* 216 F. 2d 169, 172 (1954). In this case the Court of Appeals held that in view of the conflicting evidence, the trial court was in error in granting judgment n.o.v. to the defendant. But the Court of Appeals remanded for the trial court to determine whether to set aside the verdict and grant a new trial, even though the trial court had previously denied such a motion for a new trial. The Court of Appeals said:

" . . . If the judge is of the opinion that the verdict of the jury was *against the weight of the evi-*

> *dence* or based on evidence that was false, he should set it aside and grant a new trial, *even though direction of a verdict or judgment n.o.v. was not warranted*". (216 F. 2d, 173. Emphasis added)

The distinction drawn by the Court of Appeals for the Fourth Circuit between "the weight of the evidence" and "substantial evidence to support the verdict" is recognized and enforced by the Courts of Appeals for the Seventh,[5] Eighth[6] and Ninth[7] Circuits. But there has been some confusion over the rule in the Fifth and Sixth Circuits. In *Firestone Tire & Rubber Co.* v. *Nollman,* 107 F. 2d 176 (1939), for example, the Court of Appeals for the Fifth Circuit found no error in a denial of motions for a directed verdict, for judgment n.o.v. and for a new trial, because there was "substantial evidence in the record tending to support the verdict."[8] And, in *Werthan Bag Corp.* v. *Agnew,* 202 F. 2d 119 (1953), the Court of Appeals for the Sixth Circuit stated that a new trial was properly denied because there was "substantial evidence" to support the jury's verdict.

The court of Appeals was plainly delinquent in treating this issue as it did in the instant case. While the trial judge's exercise of direction in denying a motion for a new trial is ordinarily not reviewable, it is well established that the appellate courts can and

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[5] *Adams* v. *United States,* 116 F. 2d 199, 202 (1940).

[6] *Johnson* v. *Dierks Lumber & Coal Co.,* 130 F. 2d 115, 118 (1942).

[7] *Southern Pacific Co.* v. *Guthrie,* 186 F. 2d 926, 932 (1951).

[8] See also *Orient Ins. Co.* v. *Parkhill,* 170 F. 2d 510 (5th Cir. 1948), where the denial of a new trial was sanctioned because there was "substantial evidence" to support the verdict, even though appellant had argued that the verdict was contrary to the "great weight of evidence".

do review a failure to exercise that discretion or a failure to use the correct legal standard in exercising it. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 482-483 (1933); *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251-255 (1940); *Magee* v. *General Motors Corp.*, 213 F. 2d 899, 900 (3d Cir. 1954).

It is certain that the proper exercise of this discretion would have resulted in a new trial since the trial court unequivocally stated that (R. 78):

> "I think the evidence certainly preponderates, in my opinion, in your favor."

The only scintilla of evidence in the entire record which tends to support the verdict is the testimony of one person—the plaintiff who drove the car which struck the bus—and her testimony was contrary to the account she gave on the day of the accident. Even the other passengers in her car failed to testify that the bus had swerved in front of them. The testimony of the bus driver, that his bus had been stopped for some seconds at the time of the rear-end crash, was fully and clearly supported by the only disinterested witness in the case. The possibility that the bus swerved in front of the car and stopped suddenly is dispelled by the disinterested passenger's testimony, for there was so much time between the stopping of the bus and the accident that the driver was able to open the bus door, and Mr. Bishop, a 70 year-old man, was able to walk from the middle to the front of the bus and to mount the steps. The only conceivable explanation of this accident was that Nettie Foster, after an all-night ride from North Carolina, dozed at the wheel and drove into the back of the bus, which was stationary at the time with seven lights on at the rear (R. 63, 73) and the interior lights burning (R. 64).

The "independent evidence" outlined by the Court of Appeals as supporting Nettie Foster's testimony was correctly stated in the court's opinion. The rear of the bus *was* four feet from the curb, and only the right rear of the bus and left fender of the automobile *were* damaged. The only difficulty with this "evidence" is that it was completely immaterial to the issue of negligence. The question at the trial was not whether the bus was parked with its rear slightly out from the curb, for the Court of Appeals has repeatedly held such a position legal. *Kieffer* v. *Capital Transit Co.*, 214 F. 2d 241 (D.C. Cir. 1954); *Marshall* v. *Capital Transit Co.*, 216 F. 2d 636 (D.C. Cir. 1954); *Swank* v. *Capital Transit Co.*, 220 F. 2d 807 (D.C. Cir. 1955). The sole question at the trial was whether the bus was stopped and waiting for a passenger at the time of the accident or whether the bus swerved in front of the Foster car and stopped suddenly.[9]

The practical importance of the legal question presented in this case in the proper administration of justice in the federal courts could hardly be overstated. Motions for new trials are made in a large percentage of the civil cases tried in the federal courts. The problem is a constantly recurring one and yet one which is often difficult to present on appeal because trial judges, despite this Court's admonition to indicate the grounds of their rulings, [10] frequently are not specific during

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[9] The pretrial order provided: "The gist of the plaintiffs' case is that they were in an automobile and that a bus of the defendant corp. swerved around and came to a sudden stop so that the automobile in which the plaintiffs were riding collided with the bus, not having an opportunity to avoid the collision." (R. 7-8)

[10] *Montgomery Ward & Co.* v. *Duncan*, *supra*, at 253.

this phase of the trial. This case is particularly appropriate for review because of the clear statement by the trial judge of his reason for overruling both motions and because of his prior statement on the record as to where the preponderance of the evidence "certainly" lay.

At the least, petitioner prays that the writ be granted and an opinion written clarifying the procedure under Rules 50 (b) and 59. But the practice in this case was so flagrantly in disregard of this Court's opinion in the *Montgomery Ward* case, and the sanction given that departure from the usual and accepted course of judicial proceedings by the Court of Appeals was so cavalier a treatment of the obvious error, that a summary reversal would be fully justified in the exercise of this Court's responsibility for supervising the proper functioning of the federal judiciary.

2. There was no substantial evidence to support the verdict in this case, and the complaint should be dismissed

As already shown, the story given at the trial by Nettie Foster, some 45 months after the accident, was so contradictory to all the other evidence in the case, including her own prior statements, that verdict should have been directed for petitioner. The case having gone to the jury, the proper remedy at this stage of the case, if the course suggested above is not adopted, is for this Court to remand with orders to dismiss the complaint. The clear import of *Globe Liquor Co.* v. *San Roman,* 332 U.S. 571 (1948), and *Cone* v. *West Virginia Pulp & Paper Co.,* 330 U.S. 212 (1947), is that where motions for a directed verdict and for judgment n.o.v. are properly made, as in this case, the appellate court has power to dismiss the complaint if those motions should have been granted by the trial

court. It has been so held by the circuit courts. E.g. *Capital Transit Co.* v. *Gamble,* 160 F. 2d 283 (D.C. Cir. 1947); *Brennan* v. *Baltimore & O R. Co.,* 115 F. 2d 555 (2d Cir. 1940).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANK F. ROBERSON,
Counsel for Petitioner.

HOGAN & HARTSON,
Of Counsel.
July 19, 1955.

APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,562

CAPITAL TRANSIT COMPANY, *Appellant*

v.

NETTIE E. FOSTER, CLURE EDDIE FOSTER, GENEVA CURRY, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from three final judgments totaling $39,000 following jury verdicts in favor of an automobile driver, her husband and a passenger in an auto which

ran into the rear end of a standing bus.[1] Jurisdiction of this Court to hear the appeal is based upon U. S. CODE, Title 28, Section 1291. The complaint, answer and final judgments appear on pages 2, 6 and 8-10 respectively, of the joint appendix.

STATEMENT OF CASE

The gist of the plaintiff's case, expressed in the pretrial order, was that the grandmother-passenger was in the Foster automobile driven by the plaintiff-wife when a bus of the defendant "swerved around and come to a sudden stop so that the automobile * * * collided with the bus, not having an opportunity to avoid the collision" (J.A. 8).

Only the driver testified in accordance with this theory of the accident (J.A. 18, 21-22). She claimed to have first sighted the bus through the rear view mirror (J.A. 26). Plaintiffs produced a police officer to whom the driver had stated on the day of the accident that *she did not remember anything about the accident* and that she remembered *following along after the bus* at about 25 miles per hour (J.A. 50-51). She made no claim to the policeman that the bus cut over in front of her and suddenly stopped (J.A. 50-51). Defendant produced the other Accident Investigation Unit police officer who likewise recalled that the driver stated that she remembered following behind the bus, that she did not remember anything about the accident and that she was doing 25 miles per hour (J.A. 68). Nothing on the police report indicated a claim that the bus cut over in front of the car and suddenly stopped (J.A. 69). The accident occurred between 6:30 and 7:00 a.m. in January, 1951 (J.A. 17). Five lights on the rear of the bus were burning (J.A. 73, 63; Ex. #5) as were the interior lights (J.A. 64). Two caution lights

[1] For purposes of identification references in this brief appear as "defendant" as to the appellant, Capital Transit Company; as "plaintiffs" as to the appellees collectively; and as "driver", "husband" and "grandmother-passenger" as to appellees individually. The husband was not a passenger but sued for loss of consortium and medical expense.

automatically lighted up when the brakes were applied (J.A. 73).

A disinterested prospective bus passenger who had been waiting for the bus saw it approach and stop with its center doors about opposite him (J.A. 62, 63). The bus was 35 feet long (J.A. 60). He walked to the front entrance, got on and was near the fare box when the auto hit the rear of the bus (J.A. 63, 67). This disinterested testimony was corroborated in all material respects by that of the bus operator (J.A. 72-73) who had given the same version to police at the scene of the accident (J.A. 48-49).

Defendant's request for a directed verdict, made at the close of all the evidence, was denied (J.A. 79). At the close of all the evidence, the trial court stated to defendant's counsel (J.A. 78):

> "I think the evidence certainly preponderates, in my opinion, in your favor."

After verdict, motion for judgment notwithstanding the verdicts, predicated upon lack of substantial evidence, and the alternative motion for a new trial, based upon the weight of the evidence (J.A. 11), were denied by the following Memorandum of Court (J.A. 12-13):

> "The Court is of the opinion that there is substantial evidence to support the verdict of the jury. Accordingly, the motions for judgment n.o.v. and for a new trial are overruled."

This appeal is grounded upon the failure to direct a verdict in favor of defendant since no reasonable man could have accepted the plaintiff-driver's uncorroborated trial story, which was directly contradictory to that given by her to two disinterested police officers on the day of the accident as well as to all other testimony given in the case, and upon the trial court's abuse of discretion in failing to grant a new trial since the court acknowledged that the evidence certainly preponderated in favor of defendant.

STATEMENT OF POINTS

1. The Court erred in failing to grant defendant's motion for a directed verdict at the close of all the evidence and in denying the motion for judgment notwithstanding the verdict.

2. The Court abused its discretion in failing to grant a new trial since the evidence certainly preponderated in favor of defendant in the Court's opinion.

3. The Court prejudicially erred in using as the test on the motion for a new trial whether there was "substantial evidence to support the verdict of the jury" and therefore abused its discretion.

SUMMARY OF ARGUMENT

A. The two versions of the accident were: (1) that of the plaintiff automobile driver, totally unsupported by other testimony, that defendant's bus, travelling at 30 to 35 miles per hour, overtook her automobile, proceeding at 25 miles per hour, and suddenly stopped in front of it too late for her to avoid running into the rear of the bus; and (2) that of defendant, supported by its bus operator and the disinterested prospective passenger, that the fully lighted bus had been at a stop long enough for the passenger to walk from opposite the center doors of the bus and board it at the front when the automobile crashed into its rear. The automobile driver's own statement on the day of the accident to two police officers that she did not remember anything about the accident except that she was following the bus so discredited plaintiff's theory at trial that reasonable men could not have accepted as true her uncorroborated testimony on the issue of negligence when opposed by all the other evidence. Accordingly, the verdicts lack "substantial support" under the principle of *Washington, Marlboro & Annapolis Motor Lines* v. *Maske*, 89 U.S. App. D.C. 36, 190 F.2d 621 (1951) *cert. denied* 342 U.S. 834. At most, the autoist's testimony amounted

to a "mere scintilla" which did not entitle plaintiff to go to the jury.

B. The new trial motion was expressly predicated upon the fact that the verdicts were against the "weight of the evidence". That the Court was of the opinion that they were against the weight of the evidence is established by its statement that (J.A. 78):

> "I think the evidence certainly preponderates, in my opinion, in your favor."

That the standard relative to the motion for judgment notwithstanding the verdict, i.e. whether there was substantial evidence to support the verdicts, was erroneously applied to the alternative motion for a new trial where the correct test should have been the "weight of the evidence" is established by the Memorandum of Court (J.A. 12-13):

> "The Court is of the opinion that there is substantial evidence to support the verdict of the jury. Accordingly, the motions for judgment n.o.v. and for a new trial are overruled."

This holding reveals a fundamental misconception of the entirely different test to be applied to motions for judgment notwithstanding the verdict from that applicable to motions for a new trial. *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 249, 251 (1940). Therefore, the minimum relief to which defendant is now entitled is a new trial because the trial court was admittedly of the opinion that the evidence certainly preponderated in favor of the defendant.

ARGUMENT

A. SINCE REASONABLE MEN COULD NOT HAVE DIFFERED THAT UPON THE WHOLE EVIDENCE THERE WAS NO NEGLIGENCE UPON DEFENDANT'S PART, A VERDICT SHOULD HAVE BEEN DIRECTED IN ITS FAVOR.[2]

The pretrial order set forth the narrow issue to be tried as follows (J.A. 7-8):

> "The gist of the plaintiffs' case is that they were in an automobile and that a bus of the defendant corp. swerved around and came to a sudden stop so that the automobile in which plaintiffs were riding collided with the bus, not having an opportunity to avoid the collision."

This version was still the plaintiffs' contention when the case was submitted to the jury (J.A. 80, 82). At no time in the course of the trial was permission sought by plaintiffs to amend the pretrial order to assert other or additional theories. Accordingly, the present inquiry is whether there was substantial evidence establishing the negligence charged. It is hardly necessary to emphasize that the evidence must be "substantial" and that "a mere scintilla of evidence" is not deemed sufficient to raise a question upon which reasonable men might differ. *Washington, Marlboro & Annapolis Motor Lines* v. *Maske*, 89 U.S. App. D.C. 36, 190 F.2d 621 (1951) *cert. denied* 342 U.S. 834; *Jackson* v. *Capital Transit Co.*, 69 App. D.C. 147, 99 F.2d 380 (1938); *Kresge Co.* v. *Kenney*, 66 App. D.C. 274, 86 F.2d 651 (1936).

The question of speed was mentioned by the Court in denying the motion for a directed verdict (J.A. 79):

> "I think I will let it go to the Jury. The testimony of the plaintiff was that she was going, as you say, from 20 to 25 miles an hour, that the bus driver was going

---

[2] What is set forth in this section of the brief deals with insufficiency of the evidence to constitute substantial support for the verdicts. Therefore, what is contained herein supports *a fortiori* defendant's contention that the verdicts were against the weight of the evidence and that the Court abused is discretion in failing to grant defendant's motion for a new trial.

> from 30 to 35, and he cut in front of her. It is true she is contradicted. I will overrule the motion."

However, speed was not the negligence charged in the pretrial limitation of issues. Moreover, if the bus cut over as the autoist testified, its speed, moderate or otherwise, would have been immaterial. Prior speed was likewise immaterial if defendant's theory was correct, i.e., that the bus had been at a standstill prior to the rear end crash long enough for an aged passenger to come from opposite the middle of the 35 foot bus into the front entrance. By the same token, plaintiffs' labored point that the rear of the bus was further from the curb than the front is of no consequence. Any such prior negligence would have been a mere condition rather than a proximate cause of the accident, *Roanoke Ry. & Elec. Co.* v. *Whitner*, 173 Va. 253, 3 S.E.2d 169 (1939). Accordingly, the only real issue in the case upon which the evidence mattered was whether the plaintiffs' "cutting over" theory was supported by substantial evidence.

Defendant's version of the accident was so clearly established that no reasonable man could have failed to accept the true facts in view of the whole state of the evidence. As the bus driver said, he had stopped the bus about 15 or 20 feet past a waiting passenger (a 70 year old man) who came up on the front door before the automobile ran into the back end of the bus (J.A. 73). The passenger himself testified (J.A 63):

> "I was about middleways of the bus. By the time I walked from the middleways to the front to get on there, step on that first step up there, then this car hit the rear end.
>
> * * * * *
>
> "I was on the bus when he hit."

Since the walk of 15 to 20 feet must have consumed a minimum of 3 to 5 seconds (J.A. 73), and an automobile at 25 miles per hour covers approximately 37½ feet per

second, the autoist had at least 112.5 feet of clear space in front of her *after the bus was at a standstill with five lights shining* on its rear. No reasonable man could consider the stop negligent under such circumstances.

The driver was the only occupant of the automobile who claimed to have seen the accident (J.A. 34, 38). She alone, according to her testimony at the trial, purported to remember the bus coming alongside and cutting over to a stop so suddenly that she could not avoid running into it (J.A. 21). Not only is this self-serving account directly contrary to the disinterested testimony but it is irreconcilable with the driver's own confession to the two police officers on the day of the accident that she did not remember "anything about the accident" and that she was "following behind the bus" (J.A. 50, 51, 68). Moreover, it is significant that she never made a claim to the police that the bus had cut over in front of her (J.A. 50, 51, 69). It is inconceivable that to the investigating police on the day of the accident the driver would have failed to have accused the bus driver with causing the accident had he cut her off, as she testified 45 months later. Viewing the matter in the most charitable light possible toward the plaintiff-driver, her all night ride without sleep from North Carolina (J.A. 26, 27, 42, 43) had tired her so that she drowsed in driving the car into the rear of the bus and her last *true* recollection, as she told the police officers soon after the event, was "following behind the bus" (J.A. 51, 68).

It is respectfully urged that permitting the unsupported claim of these plaintiffs to go to the jury in this state of record was a travesty which it is the duty of this Court to correct. A $39,000 reward to plaintiffs for the driver's temerity in making her self-serving reversal of stories from that given to the police (one of whom was their own witness) is a shocking injustice. The driver's denial of talking with the police (J.A. 28) is as incredible as the similar sworn denial of a prior contradictory version given

by the plaintiff in the remarkably parallel case of *Washington, Marlboro & Annapolis Motor Lines* v. *Maske*, 89 U.S. App. D.C. 36, 190 F. 2d 621 (1951) *cert. den.* 342 U.S. 834. There the Court did not hesitate to conclude that "the verdict lacks substantial support" and to act accordingly.

The similarity in the *Maske* case evidence to that in the instant case is striking. In both cases were there two diametrically opposed theories of why the accident occurred; in both the disinterested passenger version supported the defendant's version; in both the interested plaintiff alone testified to the contrary; in both plaintiff flatly denied the defendant's version; in both "it was proved beyond reasonable doubt, although appellee denied" that she had told a disinterested person a version, irreconcilable with her trial version and consistent with defendant's version. In no material respect can the cases be distinguished and this Court should, therefore, repeat its forthright statement made there that:

> * * * we must conclude the verdict lacks substantial support. * * * we must hold that appellant's motion for a directed verdict should have been granted."

B. DEFENDANT WAS ENTITLED TO A NEW TRIAL BECAUSE AS THE TRIAL COURT ADMITTED, THE EVIDENCE PREPONDERATED IN ITS FAVOR. IT WAS AN ABUSE OF DISCRETION TO DENY THE NEW TRIAL BY APPLICATION OF THE ERRONEOUS "SUBSTANTIAL EVIDENCE" STANDARD WHEN "WEIGHT OF THE EVIDENCE" WAS THE TEST PROPERLY TO BE APPLIED.

Obvious prejudicial error was committed by the trial court in mistaking the test of a motion for judgment notwithstanding the verdict as being the standard applicable to a motion for a new trial. That this misconception accounts for the error in denying the new trial is unmistakable by reason of statements made by the Court, itself. Thus, the Court said to counsel for defendant that (J.A. 78):

> "I think the evidence certainly preponderates, in my opinion, in your favor."

This is an unequivocal expression of the Court's view as to where the "weight of the evidence" lay; and weight of the evidence was the sole ground urged for defendant's alternative motion for a new trial.[3] This being so, the new trial should have been granted for otherwise a trial judge is a mere "moderator of a town meeting" rather than an integral part of our judicial system charged with seeing that his instructions on the law are applied and that miscarriages of justice are corrected.[4]

We are not left to speculate as to why the judge erroneously failed to follow his view of the preponderance of the evidence and to grant the new trial because the "Memorandum of Court" supplies the answer that an erroneous standard was applied to the alternative motion for a new trial (J.A. 12-13):

> "The Court is of the opinion that there is substantial evidence to support the verdict of the jury. Accordingly, the motions for judgment n.o.v. and for a new trial are overruled."

It is therefore clear that the trial court applied the same standard, i.e., "substantial evidence", in ruling upon both the motion for judgment notwithstanding the verdict and the alternative motion for a new trial. Since we know by the Court's own statement that the evidence "certainly" preponderated in favor of defendant, the prejudicial effect of applying the wrong test to the latter motion is clear.

Although sometimes confused by lawyers, the Courts have been careful heretofore to make clear the different considerations applicable on a motion for a directed verdict

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[3] Of course, the present argument assumes for the purpose of making it *only that the trial court was correct in denying the motion for judgment n.o.v., appellant is firmly* of the contrary view as has been fully discussed, *supra* pp. 6-9. [Italicized material omitted in original]

[4] *Patton* v. *Texas & Pacific Ry.*, 179 U.S. 658, 660 (1901): "• • • the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility."

and the later-stage motion for judgment notwithstanding the verdict under *Federal Rule of Civil Procedure* 50 (b)] is distinguished from a motion for a new trial. Thus, the Supreme Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940) said in pertinent part, at 249, 251:

> "The motion for a new trial assigned grounds not appropriate to be considered in connection with the motion for judgment. It put forward claims that the verdict was against the weight of the evidence and was excessive; that the Court erred in rulings on evidence and in refusing requested instructions. An affirmative finding with respect to any of these claims would have required a new trial whereas none of them could be considered in connection with the motion for judgment.
>
> * * * * *
>
> "The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, * * *"

As Judge Groner said, in *Pessagno* v. *Euclid Inv. Co.*, 72 App. D.C. 141, 144, 112 F.2d 577, 580 (1940):

> "A motion for directed verdict raises only the question whether reasonable men might differ on the question of negligence. * * * A motion for a new trial, however, may raise a myriad of other questions as to which appellant has the right to a ruling."

To the same effect see *Simmonds* v. *Capital Transit Co.*, 79 U.S. App. D.C. 371, 372, 147 F.2d 570, 571 (1945) which said that the trial judge was justified in concluding that the evidence preponderated against the plaintiff but *held* that judgment n.o.v. should not have been granted, pointing out that there was no alternative motion for a new trial.

Judge Parker set forth with clarity the distinction in question in *Garrison* v. *United States,* 62 F.2d 41, 42 (4th Cir. 1932):

> "There seems to be some confusion on the part of counsel as to the difference between the duty to direct a verdict and the duty to grant a new trial after verdict; and the contention is frequently made that the judge should direct a verdict whenever the evidence is such that he would be justified in setting the verdict aside. The distinction, however, is clear. *Where there is substantial evidence in support of plaintiff's case, the judge may not direct a verdict against him, even though he may not believe his evidence or may think that the weight of the evidence is on the other side;* for under the constitutional guaranty of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility. *He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence,* or is based upon evidence which is false; for *even though the evidence be sufficient to preclude the direction of a verdict,* it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice." (Emphasis supplied)

Since the trial court applied an erroneous test which resulted in denial of a new trial instead of its grant, the action was an abuse of discretion amounting to an error of law. As was said in *Boyle* v. *Bond,* 88 U.S. App. D.C. 178, 179, 187 F.2d 362, 363 (1951):

> Although the record reveals a fair and impartial attitude by the presiding judge, in denying the motion for a new trial there was a failure to recognize the great disparity between the proof and the jury's award, which technically, constituted an abuse of discretion amounting to an error of law."

The prejudicial effect of the Court's error of law being inescapable from its expressed opinion that the evidence "certainly" preponderated for defendant, a new trial is the relief to which defendant is now entitled.

CONCLUSION

Since on the record as a whole there was not substantial support for the verdicts in the plaintiff driver's uncorroborated trial version of a "cutting over", particularly in view of her previous contradictory statement "proved beyond reasonable doubt, although appellee denied" this case should be reversed upon the principles expressed in *Washington, Marlboro & Annapolis Motor Lines* v. *Maske*, 89 U.S. App. D.C. 36, 190 F.2d 621 (1951) *cert. denied* 342 U.S. 834, with direction to enter judgment in favor of defendant. At the very least, a new trial should be ordered in view of the palpable abuse of discretion in failing to apply the correct standard to the motion for a new trial.

Respectfully submitted,

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FILED

AUG 12 1955

IN THE

Supreme Court of the United States

October Term, 1955

No. 346

CAPITAL TRANSIT COMPANY, Inc., *Petitioner*

v.

NETTIE E. PORTER, CLYDE ERNEST PORTER, Guardian, *Respondents*

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 246

CAPITAL TRANSIT COMPANY, INC., *Petitioner*

v.

NETTIE E. FOSTER, CLURE EDDIE FOSTER, GENEVA CURRY, *Respondents*

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The District Court wrote no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 88-90) is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the refusing of a motion for new trial is a matter resting in the sound discretion of the trial judge.

2. Whether a motion for judgment n.o.v. should be granted where there are controverted material issues of fact for the jury.

STATEMENT

On June 28, 1952 respondents sued petitioner in the U. S. District Court for the District of Columbia, based on the negligent operation of petitioner's bus. Nettie E. Foster and Geneva Curry sued for damages as a result of personal injuries; Clure Foster, Sr. sued for loss of his wife's consortium.

Subsequent to respondents and petitioner resting their respective cases, a motion for a directed verdict was made by petitioner which was denied and judgments against the petitioner were returned by the jury on November 5, 1954.

The petitioner thereafter filed a motion for judgment n.o.v. or for a new trial. (R. 11)

The petitioner stated his ground for the motion judgment n.o.v. was "that upon the record as a whole there is no substantial evidence to support the verdicts." The petitioner's alternative motion for a new trial was on the one ground "that the verdicts were against the weight of the evidence". The petitioner in its points and authorities relative to the new trial motion stated:

> "3. The New Trial Motion
>
> The alternative motion for a new trial is made purely as a precautionary measure to make certain that at least this minimum relief is granted to defendant. The relief would not really be adequate as it would subject defendant to the expense of further defense in a case where the fully developed facts reveal that plaintiffs have no case except for sympathy.

That the verdicts were against the weight of the evidence and therefore, a new trial is in order is plain from the review of the evidence contained in 2, supra. Indeed, the court frankly stated in the discussion over sending the case to the jury that the evidence preponderated in favor of the defendant.

The fact that the jury allowed itself to be swayed by sympathy for the injured plaintiffs or bias against a public utility certainly does not alter the fact that the weight of the evidence was neither with the plaintiffs, nor even in equilibrium, but actually was overwhelmingly in favor of the defendant. The duty of the trial court under such circumstances is clear. A judicial consideration of the evidence must check the jury's palpable error in this case."

After a complete hearing in open Court, the petitioner's motion for judgment n.o.v. and for New Trial was denied. The following Memorandum was entered by the Court:

"The court is of the opinion that there is substantial evidence to support the verdict of the jury. Accordingly, the motions for judgment n.o.v. and for a new trial are overruled."

The order of the trial court denying the petitioner's motion for judgment n.o.v. or for a new trial states:

"Upon the coming on for hearing of the motions filed herein by the defendant for a new trial and for judgment N.O.V., it is this 6th day of December, 1954, ordered that said motion be, and the same are hereby overruled."

Petitioner thereafter noted an appeal and the U. S. Court of Appeals for the District of Columbia Circuit determined that petitioner's appeal was primarily without merit and otherwise found no error affecting substantial rights. On Petition for Rehearing En Banc and Modification of the Judgment of the Court of Appeals, same was denied, Per Curiam.

Respondent, Nettie E. Foster, on January 22, 1951 was driving home in the right hand lane of a highway, about a

foot from the curb, when petitioner's bus, travelling in the same direction, passed on her left. The bus swerved in front of her, pulled toward the curb, and stopped so abruptly that she was unable to avoid a collision. The bus was at an angle to the curb when it was struck. The front end near the curb and the right rear end 4 feet from the curb. (R. 18, 20, 45, 46, 70)

There was no one sitting in the front seat beside Mrs. Foster. Respondent Geneva Curry, grandmother of Nettie E. Foster, was sitting in back of the driver; Jerome Foster, age ~~12~~ 6, was sitting in the middle of the back seat and Clure Foster, Jr., ~~an infant child~~ AGE 12 was on the other side of the back seat. (R. 33)

The collision occurred about 6:30 a.m., on Kenilworth Avenue and Jay Street, N. E., Washington, D. C. The bus was destined for Kenilworth and, running at 15 MPH would take only 3 minutes to arrive there. The scheduled time of arrival for the bus at Kenilworth was 6:45 a.m. (R. 75, 79)

The bus driver, operating an empty bus, on a street devoid of traffic except for the bus and the Foster car, admitted he came to a sudden stop for the purpose of picking up a prospective passenger named Bishop; that he did not see Bishop until he was 5 or 6 feet from him (R. 76) or about even with him (R. 72, 73) and that he stopped to pick Bishop up about 15 to 20 feet beyond the bus stop (R. 76). He also testified that he was "travelling in the right hand lane over near the curb." (R. 73, 74)

Bishop, a 70-year-old man, testified that the bus stopped suddenly at the bus stop sign, or before the bus stop sign, and referring to the collision, "When he hit I was on the sidewalk." (R. 64, 67)

Testimony of the two police investigators supported Mrs. Foster's testimony that the bus cut into her path by showing that, at the moment of the impact, the bus was at an angle pointing toward the curb, its front end about a

foot away and its right rear end about 4 feet away from the curb; and that only the right rear end of the bus and left front fender of the automobile were damaged.

Mrs. Foster's testimony, together with other evidence, showed that the bus did cut in front of her path and stopped abruptly and she had no opportunity to avoid striking it. She testified the petitioner's bus, travelling in the same direction passed her on her left hand side, pulled over suddenly in front of her, and came to a sudden stop, cutting her off so suddenly there was no time for her to avoid striking the rear of the bus. That the bus was at an angle to the curb when it was struck. The angle of the bus to the curb was corroborated by measurements made by two police investigators and their testimony relative to the physical damage sustained by the motor vehicle and motor bus is also shown by plaintiff's exhibits 5 through 7 and 9 through 16. (Originals filed with this Court). (R. 39, 45, 47)

As to the bus driver's story that he was "travelling in the right lane over near the curb" such testimony was unbelievable and as the Court of Appeals states (R. 90):

> "As a result, the jury could have properly disregarded the bus driver's story that he was 'travelling in the right hand lane over near the curb.' This, in turn, may have affected the credibility of the rest of his testimony."

By reason of the collision, Mrs. Foster sustained the following injuries:

> Brain concussion, fractured skull, torn face and knees, fear of loss of an eye, three broken ribs, accompanied with heavy bleeding.

And she testified that she was rendered unconscious by the collision and that she did not make any statement at the scene of the collision or at the hospital (R. 22, 28). Relative a contention asserted by petitioner at trial that a

statement was made by her on the scene of the collision or at the hospital the Court of Appeals in its opinion of May 26, 1955 states (R. 90):

> "Moreover, there was evidence from which the jury could have found that Mrs. Foster was unconscious or only semi-conscious immediately after the accident. Hence, the jury could have rejected or attributed little weight to the evidence concerning her alleged statement made at that time."

ARGUMENT

I.

A Motion for a New Trial Is Directed to the Discretion of the Trial Court

The motion for a new trial involves the discretion of the trial Court and an order granting or denying a new trial is not reviewable except for clear abuse of discretion, *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, and that Court's action is not reviewable upon appeal, save in the most exceptional circumstances, *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 253.

There is no question that the petitioner, after the jury verdicts, vigorously and capably presented his motion for judgment n.o.v. or for a new trial to the trial Court. The remarks of the Court made during trial were fully set forth in petitioner's motion for a new trial and were considered and the Court exercising its discretion denied both motions.

In the instant case the motion for new trial was predicated upon the sole ground "that the verdicts were against the weight of the evidence."

The trial Court denied the motion for new trial in the following order:

> "Upon the coming on for hearing of the motions filed herein by the defendant for a new trial and for judgment N.O.V., it is this 6th day of December, 1954,

ordered that said motion be and the same are hereby denied."

The petitioner endeavors to obfuscate this matter by referring to the trial Court's memorandum which states:

> "The court is of the opinion that there is substantial evidence to support the verdict of the jury. Accordingly, the motions for judgment n.o.v. and for a new trial are overruled."

The Court's memorandum in effect says, that in so far as the motion for n.o.v. is concerned there is substantial evidence to support the verdict of the jury and that the Motion for Judgment n.o.v. and for a new trial are overruled.

First, it is obvious from the record that the order is controlling and in view of only one ground being advanced by petitioner for a new trial it would be futile to require other than a simple denial of the motion for new trial as it properly appears in the Court's order.

Second, it is wholly a gratuitous assumption on the part of the petitioner as to what standards the court applied to the motion. The order denying same need not state any reasons for said denial particularly when only one ground, "that verdicts were against the weight of the evidence" is advanced. This is clearly indicated in *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 248, which states:

> "Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review."

Third, Federal Rule of Civil Proceduce 52(a) states in part:

> "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or *any other motion* except as provided in Rule 41(b)."

This rule clearly states that findings of fact and conclusions of law are unnecessary and not required on the petitioner's motions and in *Shilling* v. *Schwitzer-Cummings Co.*, 79 U.S. App. D.C. 20, 142 F. (2d) 82, it has been held that even in cases where findings are necessary, they should be short and not necessarily set forth all propositions contended by the contestants.

Fourth, that this court's ruling in *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243, which states that a trial judge should indicate the grounds of his decision on a motion for a new trial applies only when a new trial is granted or perhaps, when several grounds are advanced for a new trial. Certainly it would be a futile gesture to require a trial judge to state at length reasons for denying a new trial when only one ground is advanced.

Fifth, petitioner contends on page 19 of his brief, relative motion for new trials that, "The problem is a constantly recurring one and yet one which is often difficult to present on appeal because trial judges despite this court's admonition to indicate grounds of their rulings, frequently are not specific during this phase of the trial." It appears that the petitioner now contends that every motion for a new trial should be by an order indicating grounds of the court's ruling. The petitioner did not assert this contention to the trial Court subsequent to its order denying the motion for new trial and further such contention was not presented to the Court of Appeals and is not properly to be considered as a basis for granting certiorari.

Sixth, the U.S. Court of Appeals for the District of Columbia Circuit, relative these contentions of the petitioner, determined that " . . . we find no error affecting substantial rights" (R. 90). Even if such decision was considered erroneous or unwise, that court has long been accorded, as a matter of policy by this Court, the right and duty to declare the local law of the District of

Columbia as if it were the highest court of a state, *Griffin* v. *United States*, 336 U.S. 704, 717.

II.

There Is No Conflict of Decisions

Petitioner asserts that there is confusion in the Fifth and Sixth Circuits in distinction between "the weight of the evidence" and "substantial evidence to support the verdict." Petitioner cites *Firestone Tire & Rubber Co.* v. *Nollman*, 107 F. (2d) 176 (5th Cir. 1939). The Court of Appeals in affirming the District Court did not discuss the question

> "whether the District Court erred in denying appellant's motion for a directed verdict at the close of the evidence, and in the alternative for judgment non-obstante veredicto, or a new trial" but said simply, "We find substantial evidence in the record tending to support the verdict."

This does not show a confusion over the distinction between the several motions.

Next cited by petitioner is *Orient Insurance Co.* v. *Parkhill*, 170 F. (2d) 510 (5th Cir. 1948). The statement of "substantial evidence" commented on by petitioner was made by the Court of Appeals in disposing of the contention of appellant that the "plaintiff filed a sworn statement of loss before the trial which was false and fraudulent, and made with intent to deceive defendant." The Court said "There was substantial evidence to support the finding of the jury that the sworn statements which were made by the assured were not made with intent to deceive. The trial court, therefore, properly refused to disturb the verdict in this regard."

Next cited by petitioner is *Werthan Bag Corp.* v. *Agnew*, 202 F. (2d) 119 (6th Cir. 1953). In this case *only* a motion for a new trial was made and errors claimed related to the damages awarded. The Court after discussing in detail

the evidence supporting the size of the verdict affirmed with the conclusion,

> "From a consideration of these items, it is apparent that there was substantial evidence to support a verdict of $42,500 as compensation for the injuries caused appellee in consequence of the negligence of the appellant company."

No confusion existed as to the offices of the motions for judgment N.O.V. and for a new trial as only a motion for new trial was made.

The distinction between the lack of substantial evidence required for granting of a motion N.O.V. and the "clear weight of the evidence" required on motion for new trial is discussed and followed in the following cases and there is no conflict between the 5th and 6th Circuit Court of Appeals and other circuits.

6TH CIRCUIT

General American Life Insurance Co. v. *Central Nat. Bank of Cleveland*, 136 F. (2d) 821 (6th Cir. 1943), citing *Montgomery Ward & Co.* v. *Duncan*, Supra.

5TH CIRCUIT

Marsh v. *Illinois Cent. R. Co.*, 175 F. (2d) 498 (5th Cir. 1949), citing *Montgomery Ward & Co.* v. *Duncan*, Supra.

Pennsylvania Thresherman & Farmer's Mut. Cas. Ins. Co. v. *Crapet*, 199 Fed. (2d) 850 (5th Cir. 1952), citing *Montgomery Ward & Co.* v. *Duncan*, Supra.

Foreman v. *Texas & New Orleans R. Co.*, 205 F. (2d) 79 (5th Cir. 1952).

The petitioner in its motion for a new trial raised only the one ground that the verdict was against the weight of the evidence and certainly a denial of that contention does not show a failure to exercise discretion or a failure to

use the correct legal standard in exercising it. *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474.

Petitioner in his brief (page 18) contends that "It is certain that the proper exercise of this discretion would have resulted in a new trial since the trial court unequivocally stated that (R. 78):

> "I think the evidence certainly preponderates, in my opinion, in your favor."

The recital of the Court's statement is (1) taken out of context; (2) was of no significance having been made by the Court prior to the completion of the respective cases; (3) that the Trial Court, after the respective cases were concluded denied the petitioner's motion for a directed verdict; (4) that in the pleadings and hearing of the petitioner's motion for a new trial, the Trial Court's comments were fully presented, considered, and the motion for a new trial was properly overruled.

The facts surrounding the above incident in the Trial Court are as follows. Counsel for the respective parties approached the bench regarding placing into evidence interrogatories pertaining to the bus schedule (Tr. 236). The Court ruled on said matter and asked if the parties had any prayers. Counsel for petitioner then facetiously remarked that he had a prayer for a directed verdict. The exact proceeding follows:

> "The Court: Have you any prayers?
> Mr. Roberson: I have a prayer for a directed verdict.
> The Court: *I'm afraid I will have to overrule you.*
> Mr. Roberson: I think your Honor ought to hear me.
> The Court: *It will have to be good.* I think the evidence certainly preponderates, in my opinion, in your favor. Let's go ahead and listen to what you have to say." (Tr. 239).

The petitioner thereupon rested his case and respondents proceeded with further proof and finally rested their case

(Tr. 241) and thereafter petitioner's motion for a directed verdict was heard at length (Tr. 241, 242, 243) and it was denied. After jury verdicts and judgments, the petitioner again vigorously argued for a Judgment N.O.V. or for a new trial. The remarks of the Court were fully set forth in the petitioner's motion for a new trial and were considered and the motion was denied.

III.

The Record as a Whole Shows Substantial Evidence of Petitioner's Negligence and the Decision Below Is Clearly Correct

Relative petitioner's shot gun approach to a matter involving the sanctity of jury verdicts claiming "no substantial evidence to support the verdicts." This appears to be an invitation for this Court to try the case de novo. The Trial Court's ruling on this matter was "The court is of the opinion that there is substantial evidence . . ." The U.S. Court of Appeals for the District of Columbia Circuit ruling on this matter was "The judgments are attacked primarily on the ground that there was insufficient probative evidence to take the case to the jury. We find this attack without merit." (R. 88)

This case turns solely upon an analysis of the particular facts involved, and it was for the jury to resolve all conflicts in the evidence and pass upon the credibility of the witnesses and the weight to be given their testimony. Certainly the evidence adduced issues to be determined by the jury, *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29.

The petitioner's motor bus was carelessly and negligently operated and cut in front of the motor vehicle operated by Mrs. Foster. The speed of the vehicles in the collision, the weight to be accorded testimony of witnesses, deductions to be made from sustained physical damage and photographs, etc., all present problems for the resolution of the jury.

The facts have been heretofore presented and the record has been sent to this Court by respondents and in brevity the respondents stand on the record as a whole and the enunciated opinions of this Court in its aversion to judicial invasion of the jury box, *Galloway* v. *United States*, 319 U.S. 372; *Gunning* v. *Cooley*, 281 U.S. 89.

This Court has frequently reiterated the principles of substantial evidence in the following decisions:

> "It is well settled that, where there is an uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them." *Richmond & Danville R. Co.* v. *Powers*, 149 U.S. 43, 37 L. Ed. 64.

> "Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences, the case should go to the jury." *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 87 L. Ed. 610.

> "The very essence of its (i.e., jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . Courts are not free to reweigh evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29, 35, 88 L. Ed. 520.

The substantial evidence rule in the District of Columbia is set forth in *B. & O. R. Co.* v. *Postom*, 85 U.S. App. D.C. 207, 177 F. (2d) 53.

The contentions of the petitioner in all respects fails to show the decisions of the jury, the Trial Court, and the

Court of Appeals as being incorrect in any manner; further, there is no showing of any important question of federal law in this simple case.

CONCLUSION

The decision below stating that the attacks on the judgments are without merit and that there is no error affecting substantial rights, is correct, and represents a matter of pure local law for the District of Columbia.

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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